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September 7, 2012

In re Merck & Co., Inc. Securities, Derivative & ERISA Litigation
The Consolidated Securities Action, No. 05-CV-02367

Dear Judge Chesler:

We represent Defendants (other than Dr. Scolnick) in the above-captioned action.[1] We respectfully submit this supplemental letter in further support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification (the "Opposition Brief" to the "Motion for Class Certification") in order to address the impact that this Court's August 29, 2012 Opinion and Order on Defendants' motion for judgment on the pleadings (the "August 29 Opinion") has on the Motion for Class Certification.

In its August 29 Opinion, the Court dismissed as inactionable certain of Plaintiffs' claims based on alleged misstatements that were factual recitations of past earnings, expressions of optimism concerning financial growth (*i.e.*, puffery), and/or forward-looking statements. As Defendants noted in their Opposition Brief to the Motion for Class Certification, Defendants' motion for judgment on the pleadings, if granted, would dispose of Plaintiffs' claims under the Securities Act of 1933 (the "Securities Act") in their entirety:

> This Court need not even reach the class certification question, because all of the alleged misstatements underlying Plaintiffs' Securities Act claims are inactionable and subject to Defendants' pending motion for judgment on the pleadings. (*See* Dkt. No. 322.) *First*, the Court has already held that the alleged misstatements in the 2002 Registration Statement regarding Vioxx are inactionable. *See In re Merck*, 2011 WL 3444199, at *24. Nearly identical statements are repeated in the 2002 and 2004 Prospectuses, which similarly "merely report past successes . . .

[1] Defendant Dr. Edward M. Scolnick, who is separately represented, joins in this letter.

> and convey no inaccurate or misleading information about Vioxx's commercial strength based on its safety profile." *Id.*; (*see* Compl. ¶¶ 465, 467). *Second*, Plaintiffs allege that the Offering Documents contain material misstatements because they incorporate by reference certain alleged misstatements in Merck's Form 10-Q and Form 10-K filings—specifically, Merck's Form 10-K from 2001, 2002, and 2003, as well as Merck's Form 10-Q from the First, Second, and Third Quarters of 2002 and 2003, and the First and Second Quarters of 2004. (*See* Compl. ¶¶ 461, 464, 466; *see also* Ex. 23 at 2; Ex. 24 at 2; Ex. 25 at 2.) However, Defendants' pending motion for judgment on the pleadings seeks to dismiss as inactionable all of the allegations regarding the Form 10-Q and Form 10-K filings that were incorporated by reference into the Offering Documents. (*See* Dkt. No. 322 (seeking dismissal of ¶¶ 279, 316, 327, 334, 339, 344, 349, 352, 360, 363, 369, and 372, wherein ¶ 327 contains all of the alleged misstatements underlying the allegations in ¶ 331, the paragraph that concerns Merck's First Quarter 2002 Form 10-Q).) Thus, Defendants' pending motion for judgment on the pleadings should independently dispose of all of Plaintiffs' Securities Act claims.

(*See* Opp'n Br. 31 n.24; *see also* Opp'n Br. App. A at 2-5.) Having now granted Defendants' motion for judgment on the pleadings in relevant part, this Court effectively dismissed Plaintiffs' Securities Act claims, thereby mooting any motion for class certification with respect to those claims.

Plaintiffs' Securities Act claims are based on alleged misstatements contained or incorporated in three securities offering documents: (1) the April 26, 2002 Registration Statement, (2) the April 30, 2002 Prospectus, and (3) the June 10, 2004 Prospectus (the "Offering Documents"). (*See, e.g.*, Compl. ¶ 23.) As explained below, all of the alleged misstatements contained or incorporated in the Offering Documents either (i) have been expressly dismissed by the Court as inactionable or (ii) are identical or nearly identical to alleged misstatements that have been dismissed.

First, with respect to the statements contained in the Offering Documents, the Court has already held that the alleged misstatements in the 2002 Registration Statement regarding Vioxx are inactionable. *See In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, No. 05-2367, 2011 WL 3444199, at *24 (D.N.J. Aug. 8, 2011). Identical or nearly identical statements are repeated in the April 30, 2002 and June 10, 2004 Prospectuses, which similarly "merely report past successes . . . [and] convey no inaccurate or misleading information about Vioxx's commercial strength based on its safety profile." *Id.*; (*see* Compl. ¶¶ 462, 465, 467). As such, none of the statements contained in any of the Offering Documents can form the basis of a Securities Act claim.

Second, the Offering Documents incorporate by reference various of Merck's Form 10-Q and Form 10-K filings—specifically, Merck's 10-Ks from 2001, 2002 and 2003, as well as Merck's 10-Qs from the First, Second and Third Quarters of 2002 and 2003, and the First and Second Quarters of 2004. (*See* Compl. ¶¶ 461, 464, 466.) Paragraphs 316, 331, 334, 339, 344, 349, 352, 360, 363, 369, and 372 of the Corrected Consolidated Fifth Amended Class Action Complaint identify the alleged misstatements in those filings. The Court's August 29 Opinion dismissed as inactionable the statements recited in all of those paragraphs except for

Paragraph 331—against which Defendants did not explicitly move—which contains allegations regarding alleged misstatements from Merck's First Quarter 2002 Form 10-Q. (*See* Aug. 29 Op. at 8 n.6, 11 n.8, 12 n.9.) Paragraph 331, however, merely alleges that Merck's First Quarter 2002 Form 10-Q "contained substantially the same materially false and misleading statements concerning the purported success and safety of VIOXX that were made in the Company's April 18, 2002 press release" (Compl. ¶ 331 (referencing ¶ 327))—and this Court's August 29 Opinion held that the statements that Plaintiffs quote from Merck's April 18, 2002 press release are inactionable. (*See* Aug. 29 Op. at 8 n.6, 11 n.8 (dismissing ¶ 327).) Thus, the Court has already held that none of the statements incorporated by reference into the Offering Documents can support a Securities Act claim.

Accordingly, Defendants respectfully submit that the Court's August 29 Opinion compels the dismissal of Plaintiffs' Securities Act claims in their entirety, and therefore, provides an additional, independent reason why a class cannot properly be certified to assert claims under the Securities Act.

Respectfully submitted,

Robert H. Baron

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